

83-174

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Office-Supreme Court, U.S.

FILED

AUG 3 1983

ALEXANDER L. STEVENS
CLERK

OCTOBER TERM, 1983

Thomas R. Angel and Loretta C. Angel,
Appellants,

vs.

KEVIN W. MIDLAM, SAMUEL J. FRAZIER, MARK S. DODGE
and I through X, inclusive,

Appellees.

On appeal from the Supreme Court of the
State of California

This appeal is taken pursuant to Section 1257(2)
of Title 28 of the United States Code.

28 U.S.C. §2403(b) may be applicable and shall be
served upon the Attorney General of the State.

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QUESTION PRESENTED

Whether the discrimination against the public in favor of attorneys as to causes for breach of an oral contract and constructive fraud renders the application of CCP § 340.6 repugnant to the *Fourteenth Amendment of the United States Constitution* in that such application denies equal protection under the law and thereto due process of law.

All parties appear in the caption of the case in the United States Supreme Court.

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OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division 1, is printed in Appendix "A" hereto and such opinion, as specified in the opinion, is unpublished.

JURISDICTION

The grounds on which the jurisdiction of the Court is invoked are that the discrimination against the public in favor of attorneys renders the application of CCP¹ § 340.6 repugnant to the *Fourteenth Amendment of the United States Constitution* in that such application denies equal protection under the law and thereto due process of law . . . as in the instant case, where the court applied the one year statute of limitations under CCP § 340.6 against appellants causes of action for Breach of an Oral Contract governed first by the law of contracts, not tort law and governed further by CCP § 339(1) which provides a 2 year limitation period, and for Constructive Fraud which is governed by CCP § 338(4)

¹ CCP refers to California Code of Civil Procedure.

which provides a 3 year limitation period. Since the origin of the cause herein dates back to September 26, 1978 and the cause herein was filed September 24, 1980, appellants causes of action for breach of an oral contract and constructive fraud are within the time limitations provided for under the controlling statutes CCP § 339(1) and CCP § 338(4). The courts' application of CCP § 340.6 clearly discriminates against appellants in favor of appellees, all of whom are attorneys.

The nature of the proceeding below is a lawsuit for damages for Fraud and Deceit, Constructive Fraud, Conspiracy in Fraud, Breach of an Oral Contract and legal malpractice.

Appellees, Kevin W. Midlam, Samuel J. Frazier and Mark S. Dodge (hereinafter Midlam, Frazier and Dodge or appellees), are all licensed attorneys who represented appellants, Thomas R. Angel and Loretta C. Angel (hereinafter Angels), in the prior lawsuit (Angel v Renn) case number N 8598.

Angels filed the complaint herein on September

24, 1980. Superior Court sustained appellees demurrers with leave to amend by order signed February 24, 1981.

Angels filed an amended complaint herein on March 20, 1981. Superior Court sustained appellees demurrers without leave to amend and dismissed Angels action herein by order signed July 23, 1981. Judgment was entered July 27, 1981 in Judgment book 1363 at page 437.

The Judgment Angels seek to have reviewed was entered May 17, 1983 by the Court of Appeal of the State of California, Fourth Appellate District, Division 1. A rehearing by such court was denied by order dated May 27, 1983. A hearing in the California Supreme Court was denied by order dated July 13, 1983. The notice of appeal herein was filed on July 19, 1983, in the Court of appeal, Fourth Appellate District, Division 1.

The jurisdiction of this court is invoked under *section 1257(2) of Title 28 of the United States Code.*

A copy of the order denying a hearing herein by the California Supreme Court is included herein as Appendix "B", and the notice of appeal is included herein as Appendix "C".

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The *Fourteenth Amendment of the Constitution of the United States*, Section 1 in relevant part provides:

"No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Code of Civil Procedure § 340.6 in relevant part provides:

"An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first."

California *Code of Civil Procedure* § 339(1) in relevant part provides a 2 year statute of limitation period for:

"An action upon a contract, obligation or liability not founded upon an instrument of writing."

California *Code of Civil Procedure* § 338(4) in relevant part provides a 3 year statute of limitation period for:

"An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

STATEMENT OF CASE

The question herein was raised with the Superior Court in the Supplemental clerks transcript at pages 14 thru 16, with the Court of Appeal in appellant's opening brief at pages 3 thru 6 and petition for rehearing at pages 6 & 7, and the California Supreme Court in petition for hearing at pages 13 & 14.

The substance of Angels' allegations in their amended complaint are set forth as follows:

1. Midlam and Frazier in association with Midlam intentionally misrepresented their case during trial and prior to the settlement of record in N 8598. (Amended Complaint, CT 111 thru 115)

2. Midlam and Frazier in association with Midlam demonstrated a knowledge of the law as it related to Angels cause for specific performance in their trial brief, yet and despite such demonstrated knowledge, Midlam, etc., by omission, misrepresentation and diversion misleads the Court as to Angels' case, N 8598. (Amended Complaint, CT 113/23-26)

3. Angels had a winning case in N 8598, i.e. an enforceable contract to transfer real property. (Amended Complaint, CT 113/26-28 & CT 114/1-2)

4. Angels did not authorize the settlement in N 8598. (Amended Complaint, CT 115/21-22)

5. Midlam and Frazier in association fraudulently entered settlement in case N 8598. (Amended Complaint, CT 115/21-28 & CT 116/1-8)

6. Dodge informed Angels that the settlement of record and the fact that Angels had not authorized such settlement could not be addressed at the motion to set aside judgment as rendered due to inadvertent mistake on November 3, 1978. (Amended Complaint, CT 122/25-28)

7. After Angels informed Dodge that they absolutely would not accept the promissory note of record, he mailed such promissory note to Angels advising them that such note probably belonged in their files. (Amended Complaint, CT 123/18-25)

The Court of Appeal specifically invoked the one year statute of limitations under CCP § 340.6 as to Angels' second cause for constructive fraud, fourth cause for breach of an oral contract, and fifth cause for legal malpractice as follows:

"Section 340.6 specifically excludes actual fraud but by its terms applies to all other actions against attorneys for their wrongful professional conduct. Constructive fraud is not actual fraud (Civ. Code, § 1571), and the Angels' allegations arise out of the defendants' performance of professional services. Thus, the court correctly ruled Section 340.6 applies to the second, fourth and fifth causes of action." (Opinion, page 6, last paragraph)

The Court of Appeal found that Superior Court had erred as follows:

"We believe the court incorrectly ruled the Angels failed to state a cause of action on the fourth and fifth causes of action in their complaint." (Opinion, page 14, last paragraph)

The Court of Appeal states Angels' have not stated a cause for constructive fraud in opinion at pages 12 & 13, and specifically states as follows:

"The Angels cannot show they have relied on any false representations made to them, nor can they demonstrate any of the defendants intentionally acted with the intent to defraud them." (Opinion 13/10-13)

Since, as the court of appeal allows, the Angels stated causes of action sufficient to establish damages from the professional services rendered by appellees as to causes for breach of an oral contract and legal malpractice, then it follows that Angels relied upon appellees to the extent that damage resulted. It is entirely incomprehensible that damage can result between a client and attorney as to professional services rendered without there first having been reliance in such relationship. Nowhere does the law require a continued reliance on false representations, but rather requires only reliance sufficient to have resulted in damage from such reliance.

The Court of appeal, in regard to constructive fraud, quotes from California *Civil Code* § 1573 as follows:

"Constructive fraud is ". . . any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him . . . " (Opinion, page 12, last paragraph) (Emphasis added)

Therefore, and in accordance with the definition of constructive fraud as provided in California *Civil Code* § 1573, establishing an actual fraudulent intent is not an element necessary to establish a cause of action for Constructive Fraud.

Angels' reliance on appellees is established within the opinion of the court of appeal, and it is further established within the opinion of the court of appeal that the pleading of an actual fraudulent intent is unnecessary to a cause of action for Constructive Fraud.

Since the origin of the cause herein dates back to September 26, 1978 and the cause herein was filed September 24, 1980, Angels causes of action for breach of an oral contract and constructive fraud, to which Angels have pled a sufficient cause, are within the time limitations provided for under the controlling statutes *CCP* § 339(1) and *CCP* § 338(4). The Courts' application of *CCP* § 340.6 clearly discriminates against Angels in favor of appellees, all of whom are attorneys.

SUBSTANTIALITY OF FEDERAL QUESTION

CCP § 340.6 discriminates against the public in favor of attorneys as to all causes for breach of an oral contract and constructive fraud.

The Court of Appeal allows that CCP § 340.6 conflicts with CCP § 338(4), constructive fraud, because it favors attorneys over other fiduciaries, but states that there is no constitutional requirement that the legislature enact equal statutes of limitations for different groups. (Opinion, page 9, second paragraph) The point is, we are not talking about different groups, we are talking about fiduciaries, one group.

As compared to any other fiduciary, attorneys operate already from a power base of superior knowledge as to the law. Additionally, there is substantial law elevating the fiduciary relationship between a client and attorney under the title of client-attorney privilege. Such privilege is nowhere afforded in other fiduciary relationships. The inherent contradiction and inequity involved is that

attorneys are held out to the public as the highest of possible fiduciaries, and yet are held to the lowest possible standard of accountability under CCP § 340.6.

The Court of Appeal refrains from addressing that not only does CCP § 340.6 discriminate in favor of attorneys as against all other fiduciaries but CCP § 340.6 discriminates against the public in that all clients of attorneys have only one year effectively to pursue legal recourse against attorneys under CCP § 340.6, whereas all other clients have three years to pursue effectively legal recourse against all other fiduciaries under CCP § 338(4).

Therefore, not only are all fiduciaries, other than attorneys, discriminated against under CCP § 340.6, but all clients, having a valid cause of action against an attorney, are discriminated against as well.

CCP § 340.6 conflicts with CCP § 339(1) in that it discriminates in favor of attorneys as against any client seeking legal recourse on an obligation or

liability involving an attorney's breach of an oral contract. Clients have only one year to pursue effectively legal recourse against attorneys under *CCP § 340.6*, whereas, all persons other than attorneys clients have two years to pursue legal recourse under *CCP § 339(1)*, breach of an oral contract. When an attorney agrees to represent a client in litigation, he impliedly contracts to exercise a certain degree of care, etc. in such representation. Such breach of contract could, by the facts, involve constructive fraud and/or negligence.

Lastly, *CCP § 340.6* is tort law and has no authority in contract law, and thereto, *CCP § 340.6* is not applicable to Angels cause for breach of an oral contract which is governed solely by contract law *CCP § 339(1)*.

Of considerable importance is the fact that any person pursuing legal recourse against any individual, other than a client against his attorney, can easily secure legal representation. However, obtaining legal representation against an attorney is extremely remote. Such fact is common knowledge among

the legal community to the point it can be judicially noticed as far back as 1926. In accordance with *State v Kaufmann* 202 Iowa 157, 161, "It is a matter of common knowledge that members of the legal profession are reluctant to complain of misconduct on the part of their brethren, even when it is known to exist."

And thereto exist a clear and present need for judicial supervision, since appellees, each one, are licensed attorneys in the state of California.

CONCLUSION

If a theory in law for relief and recovery has merit at all, it must be applied equally to all those persons who would qualify under such theory. We must equally presume that the Legislature intended to enact valid statutes when enacting CCP § 338(4) and CCP § 339(1). CCP § 340.6 diminishes the intent of and purposes for CCP § 338(4) and CCP § 339(1) in such a way as to set up a clear and unwarranted privilege for attorneys.

The discrimination against the public in favor of attorneys as to causes of action for a breach of an oral contract and constructive fraud as herein applied renders the application of CCP § 340.6 repugnant to the *Fourteenth Amendment of the United States Constitution* in that such application denies equal protection under the law and thereto due process of law.

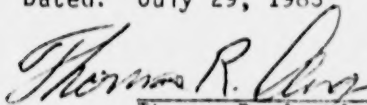
The individuals right to equal protection under the law is fundamental to due process of law and is provided for in the *Fourteenth Amendment of the United States Constitution*.

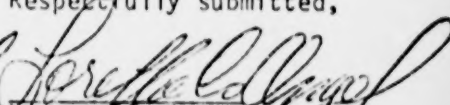
Such attorney privilege in law is nowhere justified and functions primarily against public interest in such a way as to betray public trust.

For all the foregoing reasons, appellants request that CCP § 340.6 be ruled unconstitutional and that appellants causes of action for breach of an oral contract and constructive fraud be ruled sufficiently stated causes of action under the appropriate governing statutes.

Dated: July 29, 1983

Respectfully submitted,


Thomas R. Angel
Appellant pro se


Loretta C. Angel
Appellant pro se

APPENDIX "A"

Opinion of the California
Court of Appeal

APPENDIX "B"

Denial by the California
Supreme Court

APPENDIX "C"

Notice of Appeal

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA COURT OF APPEAL-FOURTH DIST.

THOMAS R. ANGEL, ET AL.,

Plaintiffs and appellants,

v.

KEVIN W. MIDLAM, ET AL.,

Defendants and Respondents.)

FILED
MAY 17 1983

KEENAN G. CASADY, Clerk

DEPUTY CLERK

4 Civ. No. 26100

(Super. Ct. No. 459055)

Appeal from a judgment of the Superior Court of San Diego County, Carlos A. Cazares, Judge. Affirmed.

Plaintiffs Thomas R. Angel and Loretta C. Angel appeal a judgment of dismissal entered after the court sustained the defendants' demurrer without leave to amend. We affirm.

Factual and Procedural Background

We assume as true those facts which the Angels allege in their first amended complaint (see Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 170) taking judicial notice of the earlier lawsuits related to this action. (Evid. Code, § 452, subd. (d).) 2

The Angels' original action against the Renns for Specific performance was settled in September 1978. The court entered a judgment based on that settlement, and later denied the Angels' Code of Civil Procedure section 473¹ motion to set aside that judgment on the basis of mistake or inadvertence. We

¹All uncited statutory references are to the Code of Civil Procedure.

affirmed in 4 Civ. No. 18610. We twice denied Angels' petitions for rehearing and the California Supreme Court denied their petition to grant a hearing.² The Angels then sued the Renns again to set aside the original judgment on the ground of extrinsic fraud. The Renns successfully moved for summary judgment. We affirmed and imposed a \$500 sanction because the the appeal was frivolous in 4 Civ. No. 24901. We were told at oral argument that the Angels' petition for hearing in this latter case is pending at the United States Supreme Court.

3 In this case, the Angels are suing all the attorneys who represented them during their original lawsuit. The Angels believe Kevin W. Midlam, who represented them in the lawsuit, entered into an unauthorized settlement with the Renns. Samuel J. Frazier was associated with Midlam. Mark S. Dodge advised the Angels after they became dissatisfied with Midlam's representation.

The Angels' first amended complaint contains five causes of action. The first cause of action alleges fraud and deceit by Midlam, Frazier and Dodge in their initial lawsuit against the Renns. The Angels claim Midlam intentionally misrepresented facts, failed to disclose and suppressed information to induce the Angels to rely on this fraud. According to the Angels, both Midlam and Frazier misrepresented evidence to the court regarding the Angels' consent to settle the lawsuit. Moreover, in a discussion with the Angels, Midlam misrepresented the law in an attempt to obtain their agreement to settle. Within a week, the Angels informed Midlam he had misrepresented the law to them and that the settlement was unacceptable. Over the next several days, the Angels

²We denied the Renns' (4 Civ. No. 18129) and the Angels' (4 Civ. No. 22866) petitions for writs of mandate. The Angels also petitioned for a writ of certiorari, which we (4 Civ. No. 24824), our Supreme Court, and the United States Supreme Court denied. (Angel v. Superior Court (Nov. 16, 1981, NO. 81-529) 50 U.S.L.W. 3403.)

and Midlam conversed several times but did not resolve their problems.

The first cause of action also names Frazier as a party to the fraud. The Angels claim Frazier was associated with Midlam. They also maintain they conversed with Frazier in early October when he first told them he would represent them but later reneged because of a perceived conflict of interest. Frazier did, however, write an opinion letter regarding the case, but the Angels informed him it was untrue and | unacceptable. Frazier then apparently refused to see the Angels. 4

The Angels then hired Dodge in mid-October to represent them. They attempted to obtain the file of the case from Frazier who sought to discover the identity of the attorney hired to replace him. Frazier turned over the disputed letter to Dodge in the Angels' presence. Later, Dodge "reworded entirely" a declaration originally written by Loretta Angel and asked her to sign it. The new declaration did not mention the unauthorized settlement. In November, the Angels substituted Dodge from the case and proceeded in propria persona. Dodge informed them he believed their appeal would be unsuccessful and they did not have a legal malpractice action against Midlam.

The Angels claim Midlam, Frazier, and Dodge intentionally failed to disclose and actively suppressed the law and their legal opinions for the purpose of defeating the Angels' right to due process. The Angels contend the defendants' conduct was intended to defraud and deceive them.

The Angels' second cause of action is labeled "constructive fraud" and in essence repeats the allegations of the first cause of action. The Angels also allege Midlam, Frazier, and Dodge breached their fiduciary duties. In addition, the Angels claim they first learned they had legal recourse against the | defendants in February 1980. They acquired this knowledge through their own educational efforts. 5

The third cause of action alleges Midlam, Frazier, and Dodge conspired to defraud the Angels. They say Midlam and Frazier entered into a conspiracy around September 1978 with the intent to deprive them of due process. Dodge supposedly entered into the conspiracy and furthered it ". . . by cooperation with orient aid [sic] and adopted the acts of Frazier and Midlam by misrepresenting and concealing the law and legal opinions available to plaintiffs regarding the unauthorized settlement"

The fourth cause of action is for breaches of oral contracts. In March 1978 the Angels entered into an oral contract with Midlam and Frazier for legal representation. In October 1978 they entered into an oral contract with Dodge for the same purpose. Although the defendants agreed to exercise ordinary skill and knowledge, they allegedly breached the contracts by acting to defraud the Angels.

The final cause of action is for legal malpractice. All three defendants failed to exercise reasonable skill and care and acted negligently and carelessly in performing legal services for the Angels. The Angels first learned they had legal recourse against the defendants in February 1980.

6 In sustaining the demurrer without leave to amend the court found the Angels did not state facts sufficient to constitute a | cause of action in all five causes of action. The court also found the second, third, fourth, and fifth causes of action barred by the limitations period of section 340.6. The Angels appeal.

Discussion

I

Section 340.6 in pertinent part states: "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act

or omission, or four years from the date of the wrongful act or omission, whichever occurs first." This section applies to Angels' legal malpractice cause of action as well as to their breach of contract cause of action. (See Southland Mechanical Constructors Corp. v. Nixen (1981) 119 Cal.App. 3d 417, 431.) Finally, this section must also apply to the constructive fraud cause of action.

Section 340.6 specifically excludes actual fraud but by its terms applies to all other actions against attorneys for their wrongful professional conduct. Constructive fraud is not actual fraud (Civ. Code, § 1571), and the Angels' allegations arise out of the defendants' performance of professional services. Thus, the court correctly ruled section 340.6 applies to the second, fourth, and fifth causes of action. 1 7

The Angels, however, argue the one-year limitation period specified in section 340.6 did not begin to run until February 1980. The statute of limitations for a legal malpractice action begins to run when the plaintiff knows or should know all the material facts essential to show the elements of the cause of action. (See Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, 190; Bell v. Hummel & Pappas (1982) 136 Cal.App.3d 1009, 1016; McGee v. Weinberg (1979) 97 Cal.App.3d 798, 803.) In addition, the court may look to those facts the plaintiff includes in his verified complaint in ruling on a demurrer. (See Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal.App.3d 201, 204-205.) The Angels' amended complaint reveals they learned of the facts constituting the assertedly wrongful acts or omissions of the defendants in September and October of 1978. Although they state they did not learn they had legal recourse against any of the attorneys until February 1980, their complaint amply indicates their dissatisfaction with their three attorneys in late 1978. Their difficulties with Midlam came in late September 1978; at that time, they knew Midlam had entered into what they believed was an unauthorized settlement. In fact, they told Midlam he had lied to them. Thus, the one-year statute of limitations began to run in 1978. With

respect to Frazier, they learned of his potential wrongful conduct in October when, according to them, he attempted to have them sign the letter | agreeing to the settlement. The fact they retained Dodge less than a week later reinforces the conclusion they had already learned of Frazier's purported wrongful conduct. Finally, the same can be said with respect to Dodge. Whatever Dodge may have done, the fact they fired him in mid-November indicates they knew all the facts necessary to start the one-year statute of limitations running. Since the Angels filed their complaint in this action in September 1980, section 340.6 precludes their obtaining relief.

The Angels' third cause of action claims the three defendants conspired to defraud them. To the extent this conspiracy is based on actual fraud, the three-year statute of limitations provided by section 338, subdivision 4³ applies. To the extent the claim is one of constructive fraud, the analysis immediately above applies as does the one-year statute of limitations in section 340.6. We need not resolve which limitation period applies in light of our conclusion the Angels | did not state sufficient facts to constitute a cause of action for constructive fraud. (See pp. 12-13 post.)

Finally, the Angels argue the one-year limitation of section 340.6 unconstitutionally denies them equal protection. Although the Angels accurately maintain the statute conflicts with section 338, subdivision 4 because it favors attorneys over other fiduciaries who commit fraud, there is no constitutional require-

³Section 338, subdivision 4 provides:

"Within three years:

"4. An action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

ment that the Legislature enact equal statutes of limitations for different groups. Under equal protection analysis, a law which discriminates against a nonsuspect class is analyzed under rational level scrutiny. (See Serrano v. Priest (1971) 5 Cal.3d 584, 597.) Thus, if the purpose of the law is legitimate, the method by which that purpose is achieved need only be rationally related to that goal. (See ibid.) Moreover, we presume the Legislature intended to enact a valid statute. (Ector v. City of Torrance (1973) 10 Cal.3d 129, 133.) In this case, the Legislature apparently wished to consolidate the various theories under which someone could sue his attorney for malpractice. (See Southland Mechanical Constructors Corp. v. Nixen, supra, 119 Cal.App.3d at pp. 425-431.) This is certainly a legitimate goal. Moreover, making a one-year statute of limitations is reasonably related to that goal. Thus, section 340.6 is constitutional. 1

10

II

The court also determined the Angels did not state sufficient facts to constitute a cause of action for all five causes of action. The policy of construing pleadings liberally does not apply to fraud allegations; a complaint alleging fraud or deceit must include the facts of each element. (Community Cause v. Boatwright (1981) 124 Cal.App.3d 888, 901; Hall v. Department of Adoptions (1975) 47 Cal.App.3d 898, 904.) The elements of fraud are a misrepresentation with the knowledge that the statement is false and with the intent to induce reliance upon it as well as actual justifiable reliance and resulting damage. (Seeger v. Odell (1941) 18 Cal.2d 409, 414; Nelson v. Gaunt (1981) 125 Cal.App.3d 623, 635; 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 446, p. 2711.) The false representation must be made directly or indirectly to those persons the actor intends to defraud. (Bell v. Renaldo (1975) 51 Cal.App.3d 779, 781; 4 Witkin, Summary of Cal. Law, supra, § 467, p. 2729; BAJI No. 12.50.) In this case, the Angels have failed to state a cause of action in fraud.

- Although the Angels claim Midlam made a number of misrepresentations to the court, none of these statements, assuming they were false, constitutes fraud because the representations were not made to the Angels. The only statements which the Angels claim
- 11 Midlam made to them include his failing to inform | them of their legal options, his lying to them about the settlement's effect on the lis pendens and their appellate rights, and the fact he made no attempt to rescind the settlement and never informed them he had received the judgment. Assuming, as we must, the Angels can prove all these allegations, they would not succeed in demonstrating fraud. The Angels have not provided any facts Midlam intended to defraud them, nor have they shown their reliance was justifiable. The Angels' statements these elements exist are insufficient. They must provide some facts showing these elements.

- The case against Frazier is even weaker. The only statements he made to the Angels which could possibly constitute fraud consist of his saying Midlam did a good job and purportedly misinforming them of their appellate rights. In addition, he allegedly wrote an untruthful settlement offer letter and refused to cooperate with the Angels in their attempt to hire Dodge. Finally, there is a possible inference that Frazier attempted to cover up a potential malpractice action against Midlam. None of these facts constitutes fraud. The Angels have not shown Frazier intended to defraud them at any time. Moreover, most of the statements are simply opinions by an attorney, which, assuming they are false, might be the basis for a legal malpractice action. Finally, there is no indication the Angels relied on any
- 12 of Frazier's statements. | The fact they hired and fired him within a two-week period indicates they were not pleased with his representation and they could not have acted on his statements.

Finally, there is no evidence whatsoever Dodge committed fraud. The only two factual allegations with respect to Dodge are that he reworded Loretta's declaration and informed the Angels they would not be

successful in their lawsuit. There is simply no way either of these statements could be interpreted to constitute fraud. The court thus correctly ruled the Angels did not state sufficient facts to constitute a cause of action in fraud against any of the defendants.

The Angels' cause of action for constructive fraud must fail as well. Constructive fraud is "... any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him" (Civ. Code, § 1573.) It "... comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence, and resulting in damage to another. [Citations.] Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated - that is, in which such conduct is a constructive or quasi[-constructive] fraud, having all the actual consequences and all the legal effects of actual | fraud." (Estate of Arbuckle (1950) 98 Cal.App.2d 562, 568; see also Efron v. Kalmanovitz (1964) 226 Cal.App.2d 546, 559-560; 1 Witkin, Summary of Cal. Law (8th ed. 1973) Contracts, § 319, pp. 268-269.) For the same reasons the Angels fail to state a cause of action for fraud, they fail to state one in constructive fraud. The only facts the Angels plead, in addition to the facts they pleaded in their first cause of action, are essentially that a fiduciary relationship based on an attorney-client relationship existed between the Angels and each defendant at different times. The Angels cannot show they have relied on any false representations made to them, nor can they demonstrate any of the defendants intentionally acted with the intent to defraud them. Thus, the court properly ruled the Angels did not state facts sufficient to constitute a cause of action in constructive fraud.

13

The Angels' third cause of action, conspiracy in fraud, also fails. There is no tort of conspiracy. Any allegation of a tortious conspiracy must allege

the facts constituting the formation and operation of the conspiracy and of the underlying tort. (See Okun v. Superior Court (1981) 29 Cal.3d 442, 454; Unruh v. Truck Insurance Exchange (1972) 7 Cal.3d 616, 631.) In this case, the Angels allege a conspiracy in fraud. Since they have failed to state a cause of action in either actual or constructive fraud, the court properly ruled their third cause of action did not state facts sufficient to constitute a cause of action.

14

We believe the court incorrectly ruled the Angels failed to state a cause of action on the fourth and fifth causes of action in their complaint. In light of this state's policy favoring liberal construction of pleadings (§ 452; Green v. Obledo (1981) 29 Cal.3d 126, 143-144; Skopp v. Weaver (1976) 16 Cal.3d 432, 438), we believe the Angels have provided enough facts to withstand a demurrer in their causes of action for breaches of oral contracts and for legal malpractice. Since these two causes of action are barred by the one-year statute of limitations imposed by section 340.6 (see pp. 6-9, ante), the error here is harmless.

Disposition

Judgment affirmed.

Wiener

WIENER,

WE CONCUR:

Cologne

COLOGNE, Acting P.J.

Staniforth
STANIFORTH, J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 13 1983

I have this day filed Order _____

HEARING DENIED

In re: 4 Civ. No. 26100

THOMAS R. ANGEL & LORETTA C. ANGEL

vs.

KEVIN W. MIDLAM, et al.

Respectfully,

Clerk

87074-877 8-82 AM * OBP

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION 1

FILED
JUL 19 1983

Robert G. Grant, Clerk

THOMAS R. ANGEL, et al.,
Plaintiffs and Appellants

vs.

4th Civil No. 26100

KEVIN W. MIDLAM, et al.,
Defendants and Respondents

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES

NOTICE IS HEREBY GIVEN that Thomas R. Angel and Loretta C. Angel, the plaintiffs and appellants herein, hereby appeal to the Supreme Court of the United States from the final judgment of this Court entered on May 17, 1983, a hearing on which was denied by the California Supreme Court on July 13, 1983.

This appeal is taken pursuant to Section 1257(2) of Title 28 of the United States Code.

Dated: July 18, 1983

Thomas R. Angel

Thomas R. Angel
plaintiff & appellant

Loretta C. Angel

Loretta C. Angel
plaintiff & appellant